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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 580

J. BENJAMIN HALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 7-8; R. 240-241) is reported at 308 F. 2d 266.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1962 (Pet. App. 9; R. 242). A petition for rehearing (R. 244-246) was denied on October 11, 1962 (Pet. App. 10; R. 247). The petition for a writ of certiorari was filed on November 7, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether agents who listened, with the consent of an informer, to telephone conversations between the

informer and petitioner arranging for sales of liquor, and made recordings thereof, were properly permitted to testify to what they heard and to refresh their recollection from the recordings.

STATUTE INVOLVED

Section 605 of the Federal Communications Act, 48 Stat. 1103, 47 U.S.C. 605, provides in pertinent part as follows:

> * * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * *.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Georgia, petitioner was found guilty on one count (Count 2) charging the unlawful sale of untaxed liquor in violation of 26 U.S.C. 5604(a)(1) and on another (Count 5) charging that he carried on the business of a wholesale liquor dealer without having paid the required special tax in violation of 26 U.S.C. 5691(a) (R. 18, 19, 20, 231–232). The court imposed consecutive sentences of imprisonment for two years on each of the two counts (R. 22–23, 234–235). On appeal (R. 236) the conviction was affirmed (Pet. App. 9; R. 242).

The petition challenges the propriety of receiving testimony by government agents, who, with the consent of an informer, Aaron Arnold, listened in on an extension telephone and recorded conversations between the informer and petitioner arranging for sales

of 30 or 60 gallons of whiskey by petitioner to the informer on three separate occasions, *i.e.*, on April 18, 1960 (R. 107–110; 131–132), April 22, 1960 (R. 132–138), and May 3, 1960 (R. 126–129). Before each call, the agents told Arnold that they were going to listen in and make a recording of the conversation (R. 36, 100, 119–120, 155–158). Some of the transcripts of the records were used to refresh the recollection of the testifying agent (R. 109–113; 136–138).

ARGUMENT

This Court decided in *Rathbun* v. *United States*, 355 U.S. 107, that listening in on a telephone, with the consent of one party to the conversation, does not violate Section 605 of the Federal Communications Act since such listening is not an "interception" within the meaning of the statute. In *Carnes* v. *United States*, 295 F. 2d 598 (C.A. 5), certiorari denied, 369 U.S. 861, the rationale of *Rathbun* was held to apply to tape recordings made by one party to a telephone conversation. As the court of appeals observed in *Carnes*, the only difference between a person testifying to a conversation and a recording of such conversation is that the latter has the advantage of being more accurate. This case was properly held to be governed by these decisions. Here, to be sure, the agents listened in and recorded the informer's conversations with his consent, whereas in *Carnes* the recording was of the agent's own conversation. But this difference is of no moment; the

significant fact is that in both situations the listening in was not an interception.[1]

Petitioner endeavors to distinguish the cases cited above on the ground that there was no proof that the informer consented to the divulgence of the communication. Since there was no interception, it is immaterial, however, whether the informer expressly agreed that the agents might divulge or publish the contents of the conversations. In any event, if it were material, there was a sufficient showing that the informer did consent to the divulgence of the conversations. Implicit in the procedure adopted—the recordings of the conversations—was the expectation or understanding that the recordings would be used if necessary, to aid in the prosecution of petitioner.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1962.

[1] In this case there was no claim that the recording should have been accompanied by a tone signal and no evidence was developed as to the nature of the recording device used. Petitioner does not raise any issue as to the necessity for a warning signal, sought to be raised in *Ferguson* v. *United States*, No. 583 Misc., this Term. Nor is there here, as there is in *Ferguson*, any question as to state law.

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